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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICHARD L. JIVERY, Plaintiff and Appellant, v. CARL R. MARCINIAK, Defendant and Appellant; OMAR V. SANCHEZ, Defendant and Respondent.	G039652 (Super. Ct. No. 06CC04592) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Valerie F. Horn & Associates, and Valerie F. Horn for Plaintiff and Appellant Richard L. Jivery.

Weed & Company, and Richard O. Weed for Defendant and Appellant Carl R. Marciniak.

No appearance for Defendant and Respondent Omar V. Sanchez.

* * *

Defendant Carl R. Marciniak challenges a judgment against him, arguing (1) plaintiff Richard L. Jivery's conversion claim was barred by the statute of limitations, and (2) the court improperly denied Marciniak's motion to recover reasonable expenses caused by Jivery's failure to admit facts proved at trial. Jivery cross-appeals, claiming (1) "the court improperly refused instructions relating to the alternative (indemnification for loss) measure of damages and . . . Jivery's entitlement to reasonable compensation for his time expended in pursuit of his converted stock," (2) the court's finding that Marciniak and defendant Omar V. Sanchez "are not the alter egos of [defendant corporation] Sovcap Advisors, Inc. is not supported by substantial evidence," and (3) Jivery "did not waive his right to amend the judgment to add . . . Marciniak and Sanchez as alter ego judgment debtors under the default judgment for fraud and conversion rendered against Sovcap Advisors, Inc."

For the reasons discussed below, Marciniak's contentions in his appeal and Jivery's arguments in his cross-appeal lack merit. Accordingly, we affirm the judgment.[1]

FACTS

In January 2003,[2] Marciniak was the president of Sovcap Advisors, Inc. (Sovcap), as well as a director and 50 percent shareholder of the corporation. Sanchez was a director and 50 percent shareholder of Sovcap, and either its vice president or treasurer. The two men also had a company, Pacific Financial Group, that provided investor relations services and "had a network of third-party vendors" who communicated with brokers and investor groups.

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[1] We also grant Jivery's motion to augment the record on appeal, filed with this court on May 21, 2008.

[2] All dates refer to the year 2003 unless otherwise specified.

In January, defendant Shannon Newby introduced himself to Sanchez as "a very powerful broker at" defendant Laconia Capital Corporations (Laconia). Newby told Sanchez a company named Powerball "needed investor relations help" and put Sanchez in contact with Powerball's president. Powerball's president described to Sanchez the company's business (hydrogen as an alternative fuel) and exciting changes expected to "stimulate the market" for Powerball stock. Newby represented to Sanchez that he (Newby) "controlled a block of" 450,000 Powerball shares. Sanchez believed Powerball's stock price would go up, based on the static number of publicly traded shares. Sanchez and Marciniak agreed to help Powerball "disseminate [its] information" in an investor relations campaign to promote Powerball stock. Newby agreed to provide Sanchez with the names of some Powerball shareholders whose stock would be used to start up and fund the investor relations campaign. Newby and the Powerball president told Sanchez these shareholders "were fully aware of . . . how their shares were going to be used." Newby then gave Sanchez the contact information for Jivery, a Powerball shareholder. Newby told Sanchez he (Newby) would "replenish" Jivery's stock from the block of 450,000 shares Newby controlled. Sanchez's role under this scheme was to have these Powerball shareholders sign agreements and deliver their Powerball stock. Marciniak's role was to "deal with the third-party vendors."[3]

In January, Jivery owned 100,000 unrestricted shares of Powerball stock. Powerball's president informed Jivery that he (the president) "knew and . . . had worked with" Newby (the Laconia broker) and that Newby was interested in buying Jivery's Powerball stock for two dollars per share. In early February, Newby contacted Jivery and instructed Jivery that — if he wished to sell his stock for two dollars per share — he

[3] Sanchez testified at trial to the foregoing facts about the secret agreement between Newby, Marciniak, the Powerball president, and him. In a deposition, the Powerball president testified he did *not* retain Sovcap to conduct an investor relations campaign for Powerball.

should open a brokerage account with Laconia and deposit his stock into the account. As instructed, Jivery opened a Laconia account and deposited all 100,000 of his shares into it. He "[n]ever heard from [Newby] again."

A few days later, Sanchez contacted Jivery and stated Newby had referred him. Sanchez offered to sell Jivery's stock "on a consignment basis to the open market" at a price of four dollars per share, with any unsold shares to be returned to Jivery. Sanchez's attorney prepared a letter agreement documenting the deal. Sanchez asked Marciniak whether the contracting party on the letter agreement with Jivery should be Sovcap or Pacific Financial Group, and Marciniak chose to "put it under Sovcap." Marciniak suggested changes to the draft letter agreement before it was presented to Jivery. The letter agreement was dated February 3, and was solely between Sovcap and Jivery; in other words, Marciniak and Sanchez were not parties to the letter agreement. Sanchez did not disclose to Jivery the impending investor relations program and "the real purpose for which [Sanchez was] going to use [Jivery's] shares." Jivery never spoke with Sanchez again.

The letter agreement required Jivery to deliver to Laconia his stock "for deposit into an account . . . in the name and under the exclusive control of [Sovcap]." The letter agreement required Sovcap to maintain the account, and the shares in it, at *Laconia* "at all times during the term of" the letter agreement. By its terms, the letter agreement would terminate on March 31 and the sale proceeds and/or the stock be given to Jivery on or before March 31.

On February 7, pursuant to the letter agreement, 50,000 of Jivery's shares were transferred to Sovcap's account at Laconia. Simultaneously, Sanchez transferred 45,000 Powerball shares belonging to another shareholder, Greg Foster, into Sovcap's same account at Laconia — pursuant to an agreement between Sovcap and Foster — resulting in a total of 95,000 shares in Sovcap's Laconia account (50,000 of Jivery's shares plus 45,000 of Foster's).

Marciniak then directed Sanchez to transfer the shares in Sovcap's account at *Laconia* into Sovcap's account at *Bear Stearns* in order to facilitate the payment of third-party vendors. The transfer was necessary because Laconia's clearing house would not allow Jivery's stock to be transferred to third parties for a purpose not authorized under the letter agreement. Accordingly, in violation of the letter agreement, Sanchez instructed Laconia to transfer a total of 94,000 shares from Sovcap's Laconia account into Sovcap's Bear Stearns account. The transfer took place in two separate increments on February 7 and 28. Sanchez did not inform Jivery his stock had been transferred into Sovcap's Bear Stearns account.

Marciniak had sole authority over Sovcap's Bear Stearns account. Between mid-February and early March, in violation of the letter agreement, Marciniak authorized the transfer from Sovcap's Bear Stearns account of 50,000 shares to the following recipients: almost 30,000 shares to third-party vendors; 7,500 to Marciniak; 7,500 to Sanchez; 5,000 to Marciniak's friend; and 2,000 to another individual. This left a balance of 44,000 shares in Sovcap's Bear Stearns account. In February and March, Marciniak sold these 44,000 shares —apparently on the open market — and used the proceeds to pay Sovcap's expenses. Powerball stock — a "thinly traded stock" that averaged trades of between 5,000 to 10,000 shares a day — decreased in price.

On March 31 (the letter agreement's termination date), Jivery did *not* receive any payment for his stock or any of his shares back. That same day, Foster phoned Jivery, stated he too had received no sale proceeds and no stock back, and said he planned to check "into it further." In April, Michael Franzese of Laconia tried to help Jivery and Foster recover their stock from Sovcap. By the end of April, Franzese concluded Sovcap was stonewalling him.

Jivery never received any payment for his 50,000 shares. In January 2004, Sovcap dissolved.

On March 30, 2006, Jivery filed a complaint against Sovcap, Marciniak, Sanchez, Laconia, and Newby. Jivery's October 20, 2006 first amended complaint sought damages for, inter alia, conversion, fraud, and breach of contract.

The court determined to try the case in four phases: (1) liability, (2) damages, (3) exemplary damages, and (4) alter ego. Trial proceeded against Marciniak and Sanchez only, after Sovcap, Newby, and Laconia defaulted on the outstanding claims against them. By general verdict in phase one of the trial, the jury found (1) Marciniak and Sanchez converted Jivery's stock; (2) Jivery did not know before March 30, 2003 about the conversion of his shares; and (3) Marciniak and Sanchez did *not* deceive Jivery into entering into the letter agreement. In phase two of the trial, the jury found Jivery was entitled to damages of $159,055. Jivery then "withdrew his breach of contract, breach of [the] implied covenant of good faith and fair dealing, and alter ego claims" against Marciniak, Sanchez, and Sovcap. The court entered a default judgment against Sovcap for conversion and fraud, and against Laconia and Newby for conversion, fraud, and breach of fiduciary duty. The court entered judgment in Jivery's favor against Marciniak, Sanchez, Sovcap, Laconia and Newby, jointly and severally, in the amount of $159,055 plus interest.

DISCUSSION

Before we address the critical issue of whether the statute of limitations barred Jivery's conversion claim, we must first consider whether Marciniak was Sovcap's alter ego, since the latter inquiry has potential repercussions for the former. After discussing these first two questions, we will turn to Marciniak's claim he should be compensated for expenses resulting from Jivery's refusal to admit facts allegedly proved at trial. Finally, we will determine whether the court should have instructed the jury on

an alternative measure of damages for conversion and that Jivery was entitled to compensation for his time spent trying to recover his property.

Jivery Waived His Claim That Marciniak Was Sovcap's Alter Ego

In Jivery's cross-appeal, he asserts Marciniak was an alter ego of Sovcap. He concludes the court erred in two respects. First, he contends the court should have granted his motion to amend the judgment to add Marciniak as an alter ego judgment debtor on the default judgment for fraud and conversion against Sovcap. (Even though Jivery withdrew his alter ego claim against Marciniak after phase two of the trial, he asserts the withdrawal was limited to his breach of contract claims, *not* his tort claims, against Sovcap.) Second, Jivery argues the court's finding Marciniak was not Sovcap's alter ego is unsupported by substantial evidence.

Jivery's first amended complaint alleged, inter alia, Marciniak and Sanchez were the sole shareholders, officers and directors of Sovcap; each of the two men "instructed, authorized and/or ratified the statements and actions" of Sovcap; Sovcap was merely their "instrumentality, agency, conduit or adjunct" and alter ego; and Sovcap was "insolvent with substantial debt" and conditionally dissolved.

Prior to trial, Jivery's counsel, Valerie Horn, clarified to the court she would seek Marciniak's and Sanchez's alter ego liability for Sovcap's tortious conduct as well as its breach of contract. The court confirmed Horn could prove alter ego liability later in the trial, assuming Jivery won his liability case. Horn advised the court her theories were "three-fold on the conversion claim against the individual defendants, including . . . alter ego." The court asked, "Is this offered in your trial brief?" Horn replied, "Yes, it is, Your Honor."

On September 10, 2007, while the jury was in the jury room deliberating the issue of damages, the court conferred with counsel in the courtroom about Sovcap's default and Jivery's alter ego case against Marciniak and Sanchez. The court noted

Jivery's trial brief contained a section whose title suggested his alter ego case was limited to his claim against Sovcap for breach of the letter agreement. The court asked Horn: "You were suing them for alter ego on more than the letter agreement. . . . [Y]ou were suing them on the conversion claim as well." "Your title doesn't say that but now you wish to put it in, right?" Horn replied: "I don't think I need — obviously the personal finding on the conversion disposes of that." The court was about to go off record and silently read Jivery's and Marciniak's trial briefs on the alter ego issue, but Horn suggested it might be a waste of judicial resources, time and money. Horn stated if she ultimately elected a tort remedy over a contract one, she would withdraw the alter ego claim. The court asked Horn if she felt no need to go forward with an alter ego prove-up and wanted to withdraw the alter ego claim. Horn replied she did not wish to withdraw the claim until after the jury returned with its damages verdict. The court told Horn, "I'm not certain I necessarily agree with the way you sized it up on the alter ego case."

The court then heard argument from Marciniak's counsel, Richard Weed. Weed wished to proceed with the alter ego hearing. Weed argued Laconia was the fiduciary and the bailee in the case, and had defaulted on the conversion claim; therefore the statute of limitations as to Laconia was tolled until Laconia put Jivery "on notice." (The implication was that Sovcap was not required to give Jivery notice.) Weed asked the court to "[p]ut on [Jivery's] prove-up and hear some arguments why we don't get there under alter ego." (These comments suggested the significance of Jivery's alter ego claim for Marciniak's statute of limitations defense.)

The court ruled that, if Horn felt she was "in a position to withdraw . . . an element of proof that she thinks may not be negligence when the jury comes back," the court would grant her request to wait for the jury's damages verdict. The jury then returned and rendered its verdict in favor of Jivery for $159,055 in damages. Outside the jury's presence, Horn elected the tort remedy and dismissed the contract claim.

The court then noted it had previously heard from Horn on the alter ego issue, but "time has passed." The following colloquy ensued between Horn and the court:

"THE COURT: Do you want to put on an alter ego case?

"MS. HORN: No, Your Honor.

"THE COURT: You want to withdraw your charging of alter ego?

"MS. HORN: Yes.

"THE COURT: We have two defendants as to whom you are making that claim.

"MS. HORN: Yes, Your Honor. The breach of contract claim. We withdraw our alter ego claim.

"THE COURT: So as I see it there is nothing for us to do in the course of this trial."

The written judgment states: "Following Phase 2 of the jury trial, Jivery withdrew his . . . alter ego claims against [Marciniak, Sanchez, and Sovcap]."

A month later, Jivery filed a motion to amend the judgment to include Marciniak and Sanchez as judgment debtors on the default judgment against Sovcap for conversion and fraud, based on the theory they were alter egos of Sovcap. In the written motion, Jivery argued (1) Marciniak and Sanchez "dominated the ownership and control of Sovcap[,] disregarded formalities[,] failed to conduct arms-length transactions with Sovcap," and commingled funds; (2) Sovcap failed to issue stock, was undercapitalized and had no assets; and (3) "an injustice would result if the corporate entity [were] not disregarded."

At the hearing on the motion to amend the judgment, the court noted Jivery wanted to add the alter ego defendants "to the causes of action for breach of contract, as to which another defendant — which is [Sovcap] — was sued and defaulted before the trial." (Because Jivery had dismissed his breach of contract claim against Sovcap after phase two of the trial, the court's reference to that claim was likely a misstatement.) Later in the hearing, the court stated: "[W]hile the jury was deliberating on damages [in]

phase two, counsel and I came out here to the courtroom and on the record we started planning for phase four, the alter ego phase. In fact, since the jury was in the jury room it wasn't going to be needed for the alter ego phase, which is an equity count to be tried to the court, I was even prepared . . . to commence evidence that morning . . . ." The court then read aloud part of the transcript of the September 10, 2007 hearing, including the section recited above where Horn withdrew Jivery's alter ego claim.

For "two independent reasons," the court denied Jivery's motion to amend the judgment. First, the motion failed to show (1) why the alter ego hearing could not have proceeded on September 10, 2007 or (2) why Jivery did not request a continuance at that time but instead "explicitly withdrew the claim against each of the individual defendants." Second, the court found insufficient evidence that Marciniak and Sanchez were Sovcap's alter egos, especially in light of some unsupported "conclusions," "speculations," and "opinions" in Jivery's motion.

We conclude Jivery waived his alter ego claim. On September 10, 2007, the court invited — in fact, encouraged — Horn to prove up her alter ego case, but Horn resisted. She could have taken that opportunity to prove up the alter ego case for purposes of her client's tort claims, or to request a future time to do so. Instead, she did not resurrect the alter ego issue until a month after the written judgment was entered, when she came to believe the attorney fees provision in the letter agreement applied to Jivery's tort claims.[4] Because Jivery waived his alter ego claim, the court properly denied his motion to amend the judgment.

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[4] On appeal Jivery argues the reason he "sought to amend the judgment to add Marciniak and Sanchez as Sovcap's alter ego judgment debtors was so that [he] could seek to enforce the attorneys' fee provision set forth in the Letter Agreement." Jivery asserts the attorney fees provision "permitted recovery of fees to the prevailing party for tort claims." We express no opinion as to whether Jivery's interpretation of the attorney fees provision in the letter agreement is correct.

Due to Jivery's waiver, we need not address his argument that insufficient evidence supports the court's finding Marciniak and Sanchez were *not* alter egos of Sovcap. We note, however, that Marciniak filed an opposition to Jivery's motion, as well as Weed's declaration, both of which referenced Sovcap's tax returns for 2000 through 2003 showing the corporation's assets and gross receipts and reflecting its solvency.

Jivery's Conversion Claim Against Marciniak Was Not Barred by the Statute of Limitations

Marciniak contends Jivery's conversion claim was barred as a matter of law by the three-year statute of limitations. (Code Civ. Proc., § 338, subd. (c).)[5] He argues the general rule is that "a claim for conversion accrues upon the act of wrongfully taking property," and asserts the wrongful taking of Jivery's shares occurred on February 7, when the first installment of shares was transferred into Sovcap's Bear Stearns account, or at the latest, sometime in February. He concludes Jivery's March 30, 2006 complaint was filed over three years after the wrongful taking.

We first review some general legal principles concerning the statute of limitations. "'The statute of limitations usually commences when a cause of action "accrues," and it is generally said that "an action accrues on the date of injury." [Citation.] Alternatively, it is often stated that the statute commences "upon the occurrence of the last element essential to the cause of action." [Citations.] These general principles have been significantly modified by the common law "discovery rule," which provides that the accrual date may be "delayed until the plaintiff is aware of her injury and its negligent cause." [Citation.]'" (*Naftzger v. American Numismatic Society* (1996) 42 Cal.App.4th 421, 428.) "'The discovery rule protects those who are ignorant

[5] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

of their cause of action through no fault of their own. It permits delayed accrual until a plaintiff knew or should have known of the wrongful conduct at issue.'" (*Ibid*.)

With respect to conversion specifically, courts have recognized certain exceptions to the general rule that the limitations period "begins to run from the date of the conversion even though the injured person is ignorant of his rights." (*Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 561 (*Bennett*).) For example, "when the defendant in a conversion action *fraudulently conceals* the relevant facts or where the defendant fails to disclose such facts in violation of his or her *fiduciary duty* to the plaintiff[,] 'the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion.'" (*AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 639, italics added.) The fraudulent concealment exception is in some cases synonymous with the fiduciary relationship exception: "Since a fiduciary has a duty to make a full disclosure of facts which materially affect the rights of the parties, it seems obvious that any act by him amounting to a conversion of trust property is akin to a fraudulent concealment." (*Bennett*, *supra*, 47 Cal.2d at p. 561; see also *Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 916 ["exception for cases in which a fiduciary has concealed the material facts giving rise to the cause of action"].) But the fraudulent concealment exception *in a non-fiduciary case* requires some overt effort by the wrongdoer to mislead the owner or to prevent him or her from discovering material facts. In other words, the conversion by itself is insufficient to trigger the fraudulent concealment exception in a non-fiduciary case.

Another established exception tolling the statute of limitations for conversion relates to bailments. Broadly speaking, a "'bailment is the delivery of a thing to another for some special object or purpose, on a contract, express or implied, to conform to the objects or purposes of the delivery which may be as various as the transactions of men.'" (*Niiya v. Goto* (1960) 181 Cal.App.2d 682, 687 (*Niiya*); see also

Civ. Code § 1814 [voluntary deposit for a purpose].) "The general rule is that the statute of limitations does not run against a bailor and owner of the property and in favor of the bailee claiming to hold adversely to the owner until such adverse claim is brought to the knowledge of the bailor." (*Niiya*, *supra*, at p. 688.) "When personal property is legally taken the statute of limitations is tolled until the owner demands and is refused possession of it."[6] (*Ibid.*)

Finally, section 338, subdivision (c) codifies an exception to the three-year limitations period for the theft "of any article of historical, interpretive, scientific, or artistic significance," and delays accrual of the action "until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft."

Jivery argues his case falls within an exception tolling the statute of limitations because "there was evidence adduced at trial that 1) a bailment existed between Jivery and Marciniak extending the statute of limitations; 2) Defendant Marciniak was personally guilty of fraudulent concealment."[7]

Marciniak replies he was not a party to the letter agreement and therefore not a bailee of the stock. (Marciniak does not dispute that *Sovcap* held Jivery's stock

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[6] Marciniak's argument that, if a defendant's single wrongful act requires a plaintiff to make an election of remedies between damages for conversion or for breach of contract, such act must start the limitations period for both causes of action, is unpersuasive. A bailment, by definition, involves an express or implied contract, whose breach generally constitutes the conversion in question. Nevertheless, the special rule regarding the commencement of the limitations period for bailments is well-established.

[7] Jivery also argues an exception applies because (1) "Marciniak participated in a conspiracy to commit conversion where the other co-conspirators committed fraudulent concealment of relevant facts"; and (2) "Marciniak participated in a conspiracy where the other co-conspirators failed to disclose such facts in violation of their fiduciary duty to [Jivery]." He fails to support these arguments, however, with any legal authority.

under a bailment pursuant to the letter agreement.) Because Jivery waived his claim that Marciniak was an alter ego of Sovcap, we agree with Marciniak he does not stand in Sovcap's shoes as a bailee under the letter agreement.[8]

As to the fraudulent concealment exception, the jury found Marciniak did *not* deceive Jivery into entering into the letter agreement. The record reveals Marciniak had no contact with Jivery during the events in question; Marciniak personally took no affirmative steps to mislead Jivery or prevent him from learning the truth. (Jivery did not claim below, nor does he claim on appeal, that Marciniak was a fiduciary who owed him a duty of disclosure. Judgment for breach of fiduciary duty was entered only against Laconia and Newby (by default).) Jivery asserts "*Peskin v. Squires* (1957) 156 Cal.App.2d 240 [(*Peskin*)] precludes Marciniak from arguing that he had no duty to disclose by virtue of the fact that he never spoke with or had any contact with Jivery." Not so. In *Peskin*, "[t]he alleged concealment consist[ed] of [the] failure of defendant to reveal to plaintiff the fact that certain receivables sold by [a lumber company to plaintiff]

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[8] After trial, Marciniak moved for judgment notwithstanding the verdict (JNOV) or a new trial, arguing the court erred in determining the statute of limitations "did not begin to run until Jivery knew or should have known that his shares of [Powerball stock] had been converted." At the hearing on the new trial/JNOV motion, the court noted Marciniak did not introduce "evidence from which the jury could conclude . . . he was not a bailee of the [converted] stock . . . ." It further observed Marciniak did not "argue statute of limitations to the jury," and "did not submit a jury instruction to that effect." The court denied the new trial/JNOV motion, after expressing its belief that Marciniak could "be said to be in the same position as his company — of which he is a president and 50-percent shareholder" and the jury could find from the evidence "that he was a participant in the drafting of the letter agreement." As we shall discuss, the court properly denied the new trial/JNOV motion but not for the reasons stated by the court. But in the absence of extrinsic evidence, whether the letter agreement created a bailment was a question of law, not an inquiry for the jury; reviewing that issue de novo we have no doubt a bailment existed between Sovcap and Jivery. Because Jivery waived his alter ego claim against Marciniak and because Marciniak had no contact with Jivery during the events in question, there was no evidence Marciniak was a bailee. And the court's finding Marciniak was in the same position as Sovcap is inconsistent with the court's ruling Marciniak was not Sovcap's alter ego.

and purporting to be debts of defendant[] were fictitious, unenforceable as to defendant and known by him to be such." (*Id.* at p. 243.) In contrast to Marciniak, the defendant in *Peskin* had direct contact with the plaintiff. (*Id.* at pp. 245-246.) The plaintiff sent him notices of assignment of the fictitious invoices and the plaintiff's accountants asked the defendant to verify the validity of the accounts. (*Ibid.*) The defendant falsely verified to the accountants the validity of a fictitious account and kept quiet after receiving the plaintiff's notices of assignment of illegitimate invoices, thereby willfully concealing material facts. (*Id.* at p. 247.)

But our analysis does not end here. Although Jivery's conversion claim against Marciniak does not fit neatly into any established exception to the three-year statute of limitations, we find precedent for tolling the limitations period. In *Bennett, supra*, 47 Cal.2d 540, our Supreme Court reversed the lower court's sustaining of a demurrer without leave to amend. (*Id.* at p. 564.) The plaintiffs had alleged a fiduciary relationship existed between their predecessors-in-interest and the defendant bank. (*Id.* at p. 562.) The Supreme Court explained the discovery rule applied to toll the three-year statute of limitations as against the fiduciary bank. (*Id.* at pp. 561-562.) But then the *Bennett* court did more: It held the limitations period was also tolled as to 15 individual defendants who were *not* fiduciaries. (*Id.* at p. 562.) This was because the 15 non-fiduciary defendants "had notice" of the bank's breach of fiduciary duty and received property as a result of the bank's wrongful breach. (*Ibid.*)

Bennett's rationale is equally apt here. Marciniak had notice that Sovcap, the bailee, had improperly transferred Jivery's stock into Sovcap's Bear Stearns account. By reason of that tortious transfer, Marciniak gained control of the stock and gave it to himself and others. Under these circumstances, the discovery rule applied to toll the statute of limitations until Jivery knew or should have known of the conversion. The jury found Jivery did not know before March 30, 2003, that his shares had been converted.

Nor does Marciniak contend Jivery should have reasonably known of the conversion before that date.

Marciniak relies heavily on *Rose v. Dunk-Harbison Co.* (1935) 7 Cal.App.2d 502 (*Rose*), where an appellate court held the discovery rule did not apply to toll the statute of limitations. *Rose* involved the alleged conversion of stock by the defendant stock brokerage house. (*Id.* at p. 503.) *Rose*, however, was decided in 1935. At that time, the "precise question whether in an action for conversion of personal property, by one who [has] come into its possession *lawfully*, the statute commences to run at the time of the conversion, or only when the owner of the property acquires knowledge of the acts constituting the conversion, [had] not been decided by our appellate courts." (*Id.* at pp. 504-505, italics added.) According to *Rose*, the only "well-recognized exceptions to the rule" were "in cases of fraud and fraudulent concealment of [material] facts." (*Id.* at p. 505.) Since 1935, the precise question raised in *Rose* has been uniformly answered with courts applying the discovery rule; Jivery refers us to no other case that reached *Rose's* conclusion. (See, eg. *H. Russell Taylor's Fire Prevention Service Inc. v. Coca Cola Bottling Corp.* (1979) 99 Cal.App.3d 711, 725 [bailment exception is a particular application of the broader principle that "where the original taking is lawful, the statute is not set in motion until the return of the property has been demanded and refused or until a repudiation of the owner's title is unequivocally brought to his attention"]; *Niiya, supra*, 181 Cal.App.2d at p. 688; *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1088.)

For the foregoing reasons, Jivery's conversion claim against Marciniak was not barred by the statute of limitations.

The Court Properly Denied Marciniak's Motion for Expenses Caused by Jivery's Failure to Admit Facts Proved

Marciniak contends the court erred by denying him expenses under section 2033.420 caused by Jivery's failure to admit facts allegedly proved by Marciniak at trial. Section 2033.420, subdivision (a) and (b) provide: "If a party fails to admit . . . the truth of any matter when requested to do so . . . , and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. [¶] The court shall make this order unless it finds any of the following: [¶] . . . [¶] (2) The admission sought was of no substantial importance. (3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter."

A trial court's ruling under section 2033.420 will be upheld unless the trial court abused its discretion. (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864 [discussing predecessor statute which section 2033.420 replaced in 2004 "without substantive change" (2 Witkin, Cal. Evidence (2008 supp.) Discovery, § 172, p. 254.)

The requested admissions were: Marciniak was not a party to, and did not interfere with Jivery's rights under, the letter agreement; Jivery did not enter into any contract with Marciniak; Jivery did not communicate to Marciniak his (Jivery's) willingness to enter into a contract or a fiduciary relationship with Marciniak; Marciniak made no promise to Jivery, and Jivery did not rely on any promise by Marciniak; Jivery was not harmed by any conduct of Marciniak; and Marciniak made no false representation of an important fact to Jivery. Jivery denied all these requests for admission. In a December 29, 2006 letter to Horn, Weed invited Horn "to reconsider the denials." Weed expressed his intention to seek reimbursement of Marciniak's reasonable expenses under section 2033.420 and stated, "I understand that Plaintiff alleges that Mr.

Marciniak is liable under the alter ego doctrine. However, in California, there s a presumption against finding alter ego liability."

On October 10, 2007, Marciniak moved for reasonable expenses and attorney fees for Jivery's failure to admit the truth of the foregoing alleged facts. Attached to the motion was Weed's declaration stating the requests for admission "related to proving (1) there was no contract between Jivery and Marciniak; (2) there was no fiduciary relationship between Jivery and Marciniak; and (3) there was no fraud . . . by Marciniak against Jivery." Weed further declared (1) Jivery dismissed his breach of fiduciary duty claim against Marciniak before trial; (2) at trial the court found no contract existed between Jivery and Marciniak; (3) the jury found Marciniak did not deceive Jivery; and (4) during trial "the uncontroverted evidence showed" the truth of the requested admissions.

The judge denied the motion, stating: "[Marciniak] lost at trial, and so I am not going to grant the attorney fees or costs that it requires to prove those admissions. And since I didn't, they weren't really material to the outcome of the case."

Generally, a trial court's ruling will be upheld by a reviewing court, if correct under any theory, regardless of the court's stated reason. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

The court did not abuse its discretion by denying Marciniak's motion because Jivery "had reasonable ground to believe [he] would prevail on the matter." (§ 2033.420, subd. (b)(3).) "[I]n considering this issue, a court may properly consider whether at the time the denial was made the party making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial." (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 511.) At the time Jivery denied the requests for admission, he had a reasonable basis for believing he would prevail on the pertinent issues. On reasonable grounds, he maintained Marciniak was Sovcap's alter ego, hence a party to the letter agreement, a fiduciary to Jivery, and arguably a

perpetrator of fraud against Jivery. (Jivery did not withdraw his alter ego claim until after he elected his tort remedy and dismissed his contractual claims against Marciniak.)

Furthermore, Marciniak never proved at trial the alleged fact that no fiduciary relationship existed between Jivery and him. Before trial, Jivery dismissed his breach of fiduciary duty claim against Marciniak, thereby obviating the need for Marciniak to produce any proof on the issue. (*Stull v. Sparrow*, *supra*, 92 Cal.App.4th at p. 865.)

The Court Properly Instructed the Jury on Damages

The jury awarded Jivery $159,055. Jivery contends the jury, if properly instructed, "could have reasonably awarded" him $278,400 plus "reasonable compensation for his time expended in pursuit of his property." He argues "the court improperly refused instructions relating to the alternative (indemnification for loss) measure of damages and . . . Jivery's entitlement to reasonable compensation for his time expended in pursuit of his converted stock . . . ." He asserts both these measures are authorized under Civil Code section 3336.

Civil Code section 3336 provides: "The detriment caused by the wrongful conversion of personal property is presumed to be: [¶] First — The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and [¶] Second — A fair compensation for the time and money properly expended in pursuit of the property."

Thus, the first paragraph of Civil Code section 3336 establishes two alternative measures of damage. (*Moreno v. Greenwood Auto Center* (2001) 91 Cal.App.4th 201, 209.) "The first alternative is to compensate for the value of the property at the time of conversion with interest from the time of the taking. The second

alternative is compensation in a sum equal to the amount of loss legally caused by the conversion and which could have been avoided with a proper degree of prudence." (*Ibid.*) "As a general rule, the value of the converted property is the appropriate measure of damages, and resort to the alternative occurs only where a determination of damages on the basis of value would be manifestly unjust. [Citation.] Accordingly, a person claiming damages under the alternative provision must plead and prove special circumstances that require a measure of damages other than value." (*Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1302.)

As to "compensation for the time and money properly expended in pursuit of the property," (Civil Code § 3336) a party is entitled to such compensation if the evidence tends "'to show that money was properly paid out and time properly lost in pursuit of the property, and how much.'" (*Haines v. Parra* (1987) 193 Cal.App.3d 1553, 1559.) "Such evidence should be definite and certain." (*Ibid.*) "Expenses 'incurred in preparation for litigation and not in pursuit of property' cannot be allowed . . . ." (*Ibid.*) "Additionally, any such compensation must be *fair*, i.e., reasonable." (*Ibid.*)

Here, the court on its own motion instructed the jury with a modified version of Judicial Council of California Civil Jury Instructions (2007) CACI No. 2102 which included only the standard measure of damages, i.e. the value of the property at the time of conversion: "The specific damages which plaintiff claims are the fair market value of his Powerball stock shares at the time that the defendants wrongfully converted them."

The court had previously denied Jivery's request that the instruction be supplemented with the second alternative measure of damages and "a recital . . . Jivery is entitled to the fair compensation for his time and money spent in pursuit of his property." The court stated it had "evaluated the use notes to CACI [No.] 2102" and was unpersuaded "that the four dollar a share profit advantage which Mr. Jivery hoped to recover under the . . . letter agreement constitutes the type of special damages

contemplated by the CACI instruction." The court noted, "There has been in this case no evidence that such a profit was available to Mr. Jivery anywhere else in the market." The court stated, "Simply because the plaintiff had hoped to realize a profit, and perhaps in this case an unusual profit because of the defendant's alleged misrepresentations, is not a basis for special damages."

On appeal Jivery reprises the arguments he made below. He asserts special circumstances justified instructing the jury with the alternative measure of damages. These circumstances were that, under the letter agreement, he would have received four dollars per share and/or his stock back. He maintains that, had Sovcap returned some or all of his shares to him, he would have held onto the stock unless and until he could sell it for at least four dollars per share. In other words, he was unwilling to sell his stock for less than that price. He asserts it would be unfair to award him damages measured at a lower price. He concludes that, had the jury been instructed on the alternative measure of damages, it might have awarded him four dollars per share, minus Newby's commission, plus prejudgment interest, for a total of $278,400.

Even viewing the evidence in the light most favorable to Jivery's contention of instructional error (*Sills v. Los Angeles Transit Lines* (1953) 40 Cal.2d 630, 633), we find his argument unpersuasive. His assertion that, had the stock been returned to him unsold under the letter agreement, he would have held onto it (presumably hoping for appreciation), does not ring true. The undisputed facts show Jivery deposited his stock into a Laconia account because he wished to sell it to Newby for *two* dollars per share. He did this only a few days before Sanchez contacted him with a better offer. There was no evidence Jivery anticipated the stock would appreciate; we note that as of September 5, 2007, the value of Powerball stock was "negligible."

Jivery equates his case with *Betzer v. Olney* (1936) 14 Cal.App.2d 53, but there the plaintiff "had borrowed money on his stock shortly before the conversions took

place for the very reason that he did not desire to sell it." (*Id.* at p. 61.) Here, there was no evidence Jivery did not wish to sell his stock; in fact, the evidence was to the contrary.

Jivery also relies on *Myers v. Stephens* (1965) 233 Cal.App.2d 104, where an appellate court affirmed the trial court's award of lost profits under Civil Code section 3336. (*Myers*, at pp. 116, 124.) But there, the court stated the prerequisite that "such profits . . . be shown with a reasonable degree of certainty." (*Id.* at p. 118.) Evidence may not be uncertain or speculative as to "'whether any such profits would have been derived at all.'" (*Ibid.*) "[T]he evidence must make reasonably certain [the profits'] nature, occurrence, and extent." (*Ibid.*) Here, there was no evidence Jivery would have realized profits resulting from stock sales at four dollars per share, because there was no guarantee under the letter agreement the shares would be sold, rather than returned to Jivery. Nor was there any evidence a market existed for Powerball stock at that price.

Finally, the court did not err by refusing to instruct the jury Jivery was entitled to compensation for his time spent in pursuit of his stock. Acceptable costs must have "a purpose independent of the litigation, such as preparation of lists of missing property, inspection of inventories, meetings with [defendants], contacts with law enforcement authorities, and inquiries regarding appropriate courses of action." (*Gladstone v. Hillel* (1988) 203 Cal.App.3d 977, 992.) The costs must be fair, reasonable, definite, and certain. (*Haines v. Parra*, *supra*, 193 Cal.App.3d at p. 1559.) Here, the court disallowed Jivery's testimony on the subject, but asked Horn whether she had any other evidence of time or money "expended in the effort to collect the claim." Horn replied she did not have any such evidence regarding Jivery's pursuit of the property.

Accordingly, the court properly instructed the jury on damages.

DISPOSITION

The judgment is affirmed. Each party shall bear his own costs.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.